

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

HERMAN WILLIAMS

PLAINTIFF

VS.

CIVIL ACTION NO. 4:96CV64-D-B

ATLANTA CASUALTY COMPANY

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court upon the motion of the plaintiff, Herman Williams, for remand of this action to the Circuit Court of Washington County, Mississippi. The defendant, Atlanta Casualty Company, sought removal on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332. Plaintiff seeks to remand the action under the auspices of 28 U.S.C. § 1446(b) which prohibits the removal of a case based on jurisdiction conferred by citizenship diversity more than one (1) year after commencement of the action. Defendant concedes that it filed for removal outside the allowed time under the statute, but asserts that the limitation is procedural only, not jurisdictional, and therefore subject to equitable considerations. Defendant further argues that, based upon Plaintiff's deceptive and dilatory actions, the court should estop Plaintiff from asserting the one-year limitation and deny his Motion to Remand.

Section 1446(b) provides:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, **except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.**

28 U.S.C. § 1446(b) (emphasis added). The Fifth Circuit has held that this section is only a procedural provision, and not jurisdictional. Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) ("The language of the statute . . . indicates that sections 1446(b) and 1447(c) are procedural provisions."). The court construed the time limit to bear on removal jurisdiction and not original or subject matter jurisdiction. Barnes, 962 F.2d at 516. "The time limitation for removal is not jurisdictional; it is merely 'modal and formal and may be waived.'" Id. (citing Nolan v. Boeing Co., 919 F.2d 1058, 1063 n.6 (5th Cir. 1990), cert. denied, 499 U.S. 962, 111 S. Ct. 1587, 113

L.Ed.2d 651 (1991)).

This Fifth Circuit precedent was recognized by a sister court in Morrison v. National Ben. Life Ins. Co., 889 F. Supp. 945, 949-50 (S.D. Miss. 1995). The Morrison Court held itself "bound by the Barnes decision to view the one year limitation as procedural, not jurisdictional." Morrison, 889 F. Supp. at 950. The basis for the application of equitable estoppel in this case is substantially similar to that relied upon by the court in Morrison. In that case, the court found that the plaintiffs' actions "were so deceitful as to amount nearly to a fraud on the State Court." Id. at 949. The plaintiffs, in their Complaints and in discovery, unequivocally denied that their damages exceeded the jurisdictional amount required to exercise federal diversity jurisdiction. Id. at 947.¹ However, one (1) year and seven (7) days subsequent to the filing of their Complaints, the plaintiffs sought to increase their requested relief to \$2,000,000.² The plaintiffs offered no good faith basis for this abrupt about-face since they had neither received discovery responses from the defendant nor taken depositions. Id. Indeed, the court noted that the Morrison plaintiffs admitted to forum manipulation:

In the case at bar, by initially demanding only \$49,000.00 in the original complaint, and waiting until after a year had run to request an increase of that demand, plaintiff did no more than avail himself of his statutory rights, which he was entitled under the law to do.

¹The Morrison plaintiffs' Complaints contained the following paragraph:

Notwithstanding anything in this Complaint which might in any way be construed to the contrary, the total amount demanded herein by plaintiff from the defendant, exclusive of interest and costs, does not exceed Forty Nine thousand U.S. dollars (\$49,000.00). All together, even if aggregated with those in any other case(s) before this court with which this case could be consolidated, the claims and demands made in this case and the other case(s), added together, would not exceed the total sum of Forty Nine thousand U.S. dollars (\$49,000.00). If any statements hereafter in this Complaint or elsewhere are inconsistent with the foregoing, all such statements are hereby withdrawn and deleted, and the amount demanded is limited to the sum of Forty Nine thousand U.S. dollars (\$49,000.00).

Morrison, 889 F. Supp. at 947 (quoting Plaintiffs' Complaints at 1). The plaintiffs referenced their Complaints when specifically questioned about the precise damages sought. Id. (citing Plaintiffs' Responses to Discovery Requests at 11).

²In Morrison, the defendant removed the case from state court before the circuit judge could rule on the plaintiffs' motions to amend. Morrison, 889 F. Supp. at 947 & n.1.

Id. (quoting Plaintiff's Mem. in Supp. Motion to Remand at 4).³ The District Court for the Southern District of Mississippi found present the requisite elements of equitable estoppel and held that "the cases at bar cry out for a denial of Plaintiffs' Motions to Remand, because of their obvious attempt to manipulate the forum." Id. at 950-51.

In the case sub judice, Defendant similarly alleges that Plaintiff has attempted to manipulate the forum by waiting until after a year passed from the filing of the Complaint to amend and request relief over the federal diversity jurisdictional amount. However, the court is of the opinion that Plaintiff's actions are not nearly as deleterious as those set out in Morrison and do not merit the application of equitable estoppel. For instance, Williams' Complaint merely requests compensatory damages in the amount of \$836.37 and punitive damages of \$48,000. Nowhere in the Complaint is it **insisted** upon, as it was in the Morrison complaint, that the requested relief be limited to less than the jurisdictional amount.⁴ Furthermore, in response to Atlanta Casualty's request for admissions,

³The defendant asserts that Williams likewise admitted to forum manipulation in the guise of a letter to defendant's attorney wherein the plaintiff's attorney stated

I was first concerned that any amendment increasing the damages above \$50,000 might make the case eligible for removal to federal court. I am now satisfied that the amendment does not make the case removable.

Exh. E att. Def.'s Response to Plaintiff's Motion to Remand. However, that statement was prefaced with two paragraphs in which plaintiff's attorney related that he recently received the transcript of Gerald Childrey and reviewed it. After perusing the testimony contained there, plaintiff's attorney then decided to amend and request additional damages. When read in context it becomes clear that plaintiff's attorney, unlike the attorney in Morrison, did not purposefully await the passage of one year to amend in order to defeat removal. After he reviewed the new evidence brought to light by Childrey's deposition and decided to amend, it is the court's opinion that plaintiff's attorney merely queried whether he still wished to amend if doing so would allow the defendant to remove the case to federal court. The letter indicates he researched the matter, concluded that the amendment would not make the case amenable to removal due to the one-year limitation, and conveyed his legal conclusion to counsel for the opposing party.

⁴The stated request for damages contained in the pleadings is not conclusive as to the jurisdictional amount in controversy. Rule 54(c) of the Mississippi Rules of Civil Procedure provides that "final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings." Miss. R. Civ. P. 54(c). However, Rule 15(b) allows amendment to the pleadings "at any time, even after judgment." Id. 15(b). See Queen v. Queen, 551 So. 2d 197, 201 (Miss. 1989). Furthermore, if the defendant was concerned that the amount in controversy actually exceeded the jurisdictional amount, irrespective of the amount contained in the pleadings, the Fifth Circuit recently provided an avenue of relief to defendants to discourage forum manipulation. See De Aguilar v. Boeing

Williams admitted that the amount in controversy did not exceed \$50,000, **pending the taking of depositions**. Plaintiff's Answer to Defendant's First Set of Requests for Admissions, Exh. B att. Plaintiff's Rebuttal Brief.

Williams further asserts as his good faith reason, which the court found noticeably absent in Morrison, that he did not learn of a vital piece of evidence until he deposed Gerald Childrey in December, 1995.⁵ The record before the court demonstrates that Williams' attorney, H.L. Merideth, Jr., requested information concerning the scheduling of the deposition of his client as early as July 5, 1995. Plaintiff's Exh. 7 att. Plaintiff's Motion to Remand. By letter dated September 26, 1995, Mr. Merideth again set out several dates, as early as October 17, 1995, that his client would be amenable to deposition. Plaintiff's Exh. 10 att. Plaintiff's Motion to Remand. The depositions were not taken until December 5, 1995; they were not transcribed until January 8, 1996; they were not delivered until January 10, 1996. Plaintiff's Exh. 12, 13 att. Plaintiff's Motion to Remand. The Complaint in this action was filed on January 11, 1995. This court does not find fault with the plaintiff or his attorney for waiting until the transcribed deposition testimony could be reviewed before filing to amend the Complaint in this action. Furthermore, although the Plaintiff may not employ dilatory tactics to defeat

Co., 47 F.3d 1404, 1410-12 (5th Cir. 1995). "[I]f a defendant can prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount, removal is proper unless the plaintiff shows that at the time of removal he was legally certain not to be able to recover that amount. . . . In other words, where the plaintiff's claims can be proved to be of the type that are worth more than \$50,000, they can be removed unless the plaintiff can show he is legally bound to accept less." Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 n.14 (5th Cir. 1995). A plaintiff would be so bound where he waived his claim to any greater amount. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S. Ct. 586, 590, 82 L.Ed. 845 (1938); Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993). Williams neither expressly nor implicitly waived his claim for damages to an amount greater than \$50,000 merely by requesting in his Complaint an amount less than that.

⁵Without delving too deeply into the facts of the case, Williams has sued his insurer, Atlanta Casualty Company, for allegedly wrongfully withholding payment upon a claim made by Williams. Atlanta Casualty Company apparently cancelled the policy for non-payment of premiums. Williams alleges that he timely paid all premiums due under his policy and that Atlanta Casualty Company handled the receipt and posting of the paid premiums in a grossly negligent fashion. The information discovered during the deposition of Gerald Childrey concerned how the defendant handled the copy of a money order paying the premium and a certain handwritten note from Williams' daughter.

the statutory right of removal, neither is he under a burden to accelerate employment of trial tactics so as not to preclude avenues otherwise available to the opposing party. In this case, Williams received the deposition transcript one day before the one-year limitation ran under § 1446(b) for timely removal. This court will not punish the plaintiff by failing to meet a one day turn-around deadline for the advantage of the opposing party. The court is of the opinion that the plaintiff's actions in this case do not merit the application of equitable estoppel and the court finds that the defendant is procedurally barred from removing this action pursuant to 28 U.S.C. § 1446(b).

CONCLUSION

The court finds that neither the plaintiff nor his attorney acted in such a way as would justify this court to estop them from asserting the time bar contained in 28 U.S.C. § 1446(b). The defendant removed the case more than one year after the action was commenced with this court's jurisdiction premised upon federal diversity pursuant to 28 U.S.C. § 1332. Section 1446(b) prohibits such removal outside the one-year limit and the court is of the opinion that the plaintiff's Motion to Remand is well taken and the same shall be granted.

A separate order in accordance with this opinion shall issue this day.

THIS ___ day of May, 1996.

United States District Judge

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ORDER GRANTING MOTION TO REMAND

Pursuant to a Memorandum Opinion issued this day, this court finds the Motion of the plaintiff, Herman Williams, to Remand well taken and the same shall be granted.

Therefore, it is ORDERED, ADJUDGED and DECREED that:

- 1) the plaintiff's, Herman Williams, Motion to Remand is hereby GRANTED.
- 2) this case is remanded to the jurisdiction of the Circuit Court of Washington County, Mississippi.

SO ORDERED this ____ day of May, 1996.

United States District Judge